

**COURT OF APPEALS
DECISION
DATED AND FILED**

June 27, 2006

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 2005AP889

Cir. Ct. No. 2003CV4680

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT I**

MARK GARBER,

PLAINTIFF-RESPONDENT,

V.

FIDELIS OMEGBU,

DEFENDANT-APPELLANT.

APPEAL from orders of the circuit court for Milwaukee County:
PATRICIA D. MCMAHON, Judge. *Affirmed.*

Before Wedemeyer, P.J., Fine and Curley, JJ.

¶1 WEDEMEYER, P.J. Fidelis Omegbu appeals from an order granting summary judgment to Mark Garber and dismissing Omegbu's four-part counterclaim against Garber. Omegbu also appeals from orders granting to Garber frivolous claims sanctions and challenges orders denying his other diverse

motions. For reasons to be stated, we affirm the orders of the trial court in all respects.

BACKGROUND

¶2 On December 4, 2002, Garber filed a small claims action against Omegbu to evict him from apartment #8 in the building Garber owned located at 7620 West Donna Court, Milwaukee, Wisconsin. On December 26, 2002, the trial court granted a default judgment for eviction in favor of Garber together with damages of \$1681.90. On April 18, 2003, Omegbu moved to reopen the small claims judgment and order which, after a hearing on May 2, 2003, the court granted.

¶3 On May 21, 2003, Omegbu filed a supplemental answer and counterclaim against Garber. In his pleading, Omegbu denied all of the allegations in Garber's complaint and, by way of the counterclaim, alleged four separate causes of action: (1) breach of express warranty; (2) breach of implied warranty; (3) liability for tenant's personal injuries; and (4) conversion of property and wrongful eviction of defendant. Garber, in turn, filed an answer on June 20, 2003, denying all of Omegbu's alleged claims. On August 13, 2003, Garber filed a motion to compel discovery. At a hearing on August 25, 2003, the trial court accomplished several things. It established a scheduling order for the submission of pretrial reports, proposed jury instructions, proposed verdict form, and any motions *in limine*. The submission date for these matters was May 1, 2004, with a pretrial conference set for May 14, 2004. It further approved utilizing a mediator, which procedure was to be completed no later than May 1, 2004. It also ruled on the motion to compel discovery and awarded Garber \$575 in reasonable attorney's

fees. Garber filed his pretrial report on April 30, 2004, and Omegbu filed his report on May 10, 2004.

¶4 In the meantime, Garber moved the trial court for a summary judgment requesting dismissal of all four of Omegbu's claims. On May 10, 2004, after a hearing, the trial court granted the motion to dismiss the four causes of action and awarded costs to Garber. During the hearing, the issue of insurance liability coverage was raised. The trial court noted that although the issue had not been formally raised, if it were, there would be no basis for it and the court would consider it frivolous. A final pretrial conference was rescheduled for June 23, 2004. Omegbu filed his notice of appeal from the May 10, 2004 bench decision before a written order for judgment was entered. Garber filed a motion to dismiss the appeal, which we granted because, in the absence of a written order for judgment, this court lacked jurisdiction.

¶5 On October 18, 2004, Garber filed a motion for costs and attorney's fees pursuant to WIS. STAT. §§ 814.025 and 802.05 (2003-04)¹ on the basis that Omegbu's counterclaim was frivolous. A date for a final pretrial conference was reset for December 21, 2004. A hearing date on Garber's motion for costs was set for November 15, 2004. On November 15, the trial court concluded that Omegbu's counterclaim was frivolous. It set January 24, 2005, as the final day for making submissions relating to calculating attorney's fees, costs, and out-of-pocket expenses. It also granted Garber's motion to dismiss his claim for eviction damages.

¹ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

¶6 On January 7, 2005, Omegbu filed a motion to sanction Garber's counsel. On January 25, 2005, Omegbu moved the trial court to stay the proceedings and to bifurcate the issues to first try the issue of insurance coverage before trying the issues of liability and damages. On February 2, 2005, the trial court entered judgment ordering that Garber was entitled to recover costs in the amount of \$1988.59 and attorney's fees of \$25,592.25 incurred in defending against Omegbu's counterclaim. It further denied Omegbu's motion for sanctions against Garber and likewise his motion to stay and bifurcate. It also granted Garber's motion to award fees and costs. It finally ordered that Omegbu was prohibited from filing any further motions until such time as he submitted evidence that he had paid a \$475 sanction earlier imposed for violating a discovery order. On March 9, 2005, the trial court amended its judgment to include an additional \$1012 for attorney's fees and costs of \$15 for Garber's defense against Omegbu's motions for sanctions and his motion to stay and bifurcate.

¶7 Omegbu appealed from the final judgment dated February 2, 2005. Unexpectedly, he also included in his notice of appeal an appeal from a final judgment entered in a criminal case numbered 02CM2619 which had been entered against him in Milwaukee County relating to an altercation between him and his wife that is the genesis for the counterclaims filed in this action. Next, Omegbu moved to supplement the appellate record to include the file for case 02CM2619. Garber objected. On August 16, 2005, we denied Omegbu's motion on the basis that the right for a direct appeal pursuant to WIS. STAT. § 809.30 had long before expired.²

² We have related the long tangled procedural history of this litigation in the hope of simplifying an understanding of the issues pertinent to this appeal.

ANALYSIS

¶8 Omegbu appeals from an order granting summary judgment dismissing his four counterclaims and from orders both granting frivolous claims and motion sanctions and from orders denying various other motions submitted by him. In the interest of orderliness, we shall first examine the propriety of the order for summary judgment. Next, we shall address Omegbu's claims of trial court error in granting various sanctions against him and denying his motion for sanctions against Garber. Lastly, we shall consider Omegbu's remaining claims of trial court error in not granting the balance of his unsuccessful motions.

A. Motion for Summary Judgment.

STANDARD OF REVIEW AND APPLICABLE LAW

¶9 We review summary judgments independently, employing the same methodology as used by the trial court. ***Green Spring Farms v. Kersten***, 136 Wis. 2d 304, 315, 401 N.W.2d 816 (1987). We shall affirm the trial court's decision granting summary judgment if the record demonstrates that there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. WIS. STAT. § 802.08(2).

¶10 Summary judgment is appropriate when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." ***Id.*** Courts examine summary judgment motions in a three-step process. ***Grams v. Boss***, 97 Wis. 2d 332, 338, 294 N.W.2d 473 (1980).

¶11 First, it must be determined that the pleadings set forth a claim for relief as well as a material issue of fact. *Id.* Second, the court must determine whether the moving party's affidavit and other proofs present a *prima facie* case for summary judgment. *Id.* A defendant states a *prima facie* case for summary judgment by showing a defense that would defeat the claim. *Preloznik v. City of Madison*, 113 Wis. 2d 112, 115-16, 334 N.W.2d 580 (Ct. App. 1983). Finally, the court examines the affidavits and proofs of the opposing party to determine whether any disputed material fact exists, or whether any undisputed material facts are sufficient to allow for reasonable alternative inferences. *Grams*, 97 Wis. 2d at 338. The court proceeds to each succeeding step only if it determines that the appropriate party has satisfied the preceding step. The mere allegation of a factual dispute will not defeat an otherwise properly supported motion for summary judgment. *Kenefick v. Hitchcock*, 187 Wis. 2d 218, 224, 522 N.W.2d 261 (Ct. App. 1994). To the extent a trial court goes beyond summary judgment methodology in a hearing serving other purposes and makes factual findings, those findings will not be set aside, unless they are clearly erroneous. WIS. STAT. § 805.17(2); *Schmeling v. Phelps*, 212 Wis. 2d 898, 906, 569 N.W.2d 784 (Ct. App. 1997).

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¶12 Omegbu's first claim of error is the impropriety on the part of the trial court in dismissing his counterclaim which was filed in response to Garber's eviction action. As set forth earlier in this opinion, Omegbu's counterclaim alleged four separate causes of action: (1) breach of express warranty; (2) breach of implied warranty; (3) liability for tenant's personal injury; and (4) conversion of personal property and wrongful eviction of the defendant.

¶13 The first three claims are based upon an alleged defective condition of leaking water in the bathroom of the apartment Omegbu had rented from Garber, and an injury to his leg which he allegedly received on April 6, 2002, due to falling on the bathroom floor as a result of leaking water.

¶14 As a result of the evidentiary submissions made at the summary judgment hearing on May 10, 2004, the trial court found that Omegbu had presented no evidence that Garber's actions were the "cause of any injury" to him. In rendering its decision, the trial court noted the defendant had testified in a deposition he did not know when he twisted his knee and hurt his leg. In the same deposition, he testified: "I don't recall anything that happened in the bathroom." At no time during his deposition did he state that he fell and hurt his leg because of water on the floor.

¶15 The record further reflects that on the evening of April 6, 2002, officers of the Milwaukee Police Department responded to a domestic violence incident at 7620 West Donna Court, apartment #8, the residence of Omegbu. He was arrested for domestic violence and battery. Omegbu's wife, Jessie, informed police that Omegbu "flipped her over his back at which time he fell causing her to fall onto his leg." Omegbu was conveyed to St. Michael's Hospital where he was treated for torn ligaments and a possible leg fracture.

¶16 The trial court concluded the evidence was overwhelming that there was no responsibility on the plaintiff for any injury sustained by the defendant to his leg in the apartment. The evidence submitted by Garber "supports a finding that there is no genuine issue of material fact that the plaintiff is responsible for any injury that [Omegbu] sustained on April 6, 2002" Our review of the record provides unequivocal support for the trial court's conclusion to dismiss the

first three claims of Omegbu's counterclaim. There is simply no factual basis for Omegbu's claim that a leak in the bathroom resulted in personal injury to him. Accordingly, the trial court did not err in dismissing the three counterclaims related to this claim.

¶17 Omegbu's fourth cause of action alleges wrongful eviction and conversion of his personal property by Garber. In examining these claims, the trial court noted that Omegbu conceded in his deposition testimony that he failed to pay his November 2002 rent after he received a notice to pay the rent or vacate. As a result, the trial court concluded, "there is no factual dispute." The trial court did not err in its conclusion. Omegbu admits that he failed to pay his rent. Accordingly, the eviction was not "wrongful."

¶18 As a basis for his conversion claim, Omegbu alleges that Garber delivered "certain property to Eagle Moving Corp." while "selling the most valuable and significant properties of the defendant or converting them to his own use." At his deposition, Omegbu stated that a twelve-year-old boy had told his son that one of Omegbu's red couches had been given to him. Omegbu was unable to name the boy. This testimony, for the purposes of summary judgment, is inadmissible hearsay. WIS. STAT. § 802.08(3) ("Supporting and opposing affidavits shall be made on personal knowledge and shall set forth such evidentiary facts as would be *admissible in evidence*."). (Emphasis added.). Furthermore, Omegbu's deposition testimony contained the admission by Omegbu that: "I never knew what happened to them" i.e., his personal property.

¶19 The record further reflects that Omegbu had an appointment to redeem his personal property from storage at Eagle Movers, but declined to pay the storage charges. After Omegbu refused to pay, Eagle Movers sold the

property. Thus, it was Omegbu's choice that led to the sale of his property, not anything related to Garber's actions. In addition, Omegbu failed to provide any documentary proof to establish ownership of any personal property in response to Garber's request for production of documents. Here again, from a review of the record, there is a satisfactory basis for the trial court's summary judgment conclusion, for there is no genuine issue of material fact relating to any acts of conversion on the part of Garber.

B. Frivolous Awards.

¶20 Omegbu asserts that the trial court erred in concluding his counterclaims were frivolous warranting the assessment of appropriate sanctions.

STANDARD OF REVIEW AND APPLICABLE LAW

¶21 Under WIS. STAT. § 814.025(1), a court is empowered to impose costs determined under WIS. STAT. § 814.04 and reasonable attorney's fees if a counterclaim is found at any time during the proceeding to be frivolous. If frivolousness is found, the court must examine the evidence of the amount claimed in fees and make an award as set forth in § 814.025(1). *Stivarius v. Di Vall*, 121 Wis. 2d 145, 158, 358 N.W.2d 530 (1984).

¶22 To find a counterclaim frivolous under WIS. STAT. § 814.025(1), the court must find "one or more of the following":

(3)(a) The ... counterclaim ... was commenced, used or continued in bad faith, solely for purposes of harassing or maliciously injuring another.

(b) The party ... knew, or should have known, that the ... counterclaim ... was without any reasonable basis in law or equity and could not be supported by a good faith argument for an extension, modification or reversal of existing law.

¶23 A claim cannot reasonably be made in good faith where no set of facts exists to satisfy the element of the claim, or the party knows or should have known that the “needed facts do not exist or cannot be developed.” *Stern v. Thompson & Coates, Ltd.*, 185 Wis. 2d 220, 244, 517 N.W.2d 658 (1994).

¶24 A finding under WIS. STAT. § 814.025 is based on an objective standard requiring a determination of whether the party or attorney knows or should have known that the position taken was frivolous as determined by what a reasonable attorney would have known or should have known under the same or similar circumstances. *Stern*, 185 Wis. 2d at 240-41.

¶25 This inquiry “involves a mixed question of law and fact.” *Id.* A determination of what a reasonable attorney knows or should have known involves a question of fact. *Id.* Findings on these matters are not disturbed unless they are clearly erroneous. *Id.* “[T]he ultimate conclusion about whether what was known or should have been known supports a finding of frivolousness ... is a question of law.” *Id.*

¶26 It is the duty of the court to determine “whether the evidentiary facts available to the party against whom a finding of frivolousness is sought provide any reasonable basis for meeting the party’s burden of proof.” *Riley v. Lawson*, 210 Wis. 2d 478, 492, 565 N.W.2d 266 (Ct. App. 1997). If no facts have been proffered that satisfy the necessary elements of the claim, the claim itself cannot be said to be brought reasonably and in good faith. *Id.* Similarly, the claim cannot be said to be reasonable and in good faith if the party knows or should have known that the necessary facts do not exist or cannot be developed. *Id.* at 491-92.

¶27 Thus, when the record on appeal demonstrates that no evidentiary facts exist which provide any reasonable basis for satisfying the party's burden of proof, a conclusion of frivolousness is warranted. *Id.* at 492.

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¶28 From our review of the record in this regard, we conclude the trial court amply set forth reasons why no evidentiary facts exist which provide any reasonable basis for satisfying any of Omegbu's claim of facts. Consequently, the conclusion of frivolousness reached by the trial court is more than adequately supported by the record.

¶29 Omegbu next claims the trial court erroneously exercised its discretion in its determination of the costs and attorney's fees as a sanction on the basis of submitted affidavits without a hearing.

STANDARD OF REVIEW AND APPLICABLE LAW

¶30 It is a discretionary power of the trial court to award reasonable attorney's fees under WIS. STAT. § 814.025 when the fees under examination are "sufficiently related to the cause of action before the court." *Lenhardt v. Lenhardt*, 2000 WI App 201, ¶14, 238 Wis. 2d 535, 618 N.W.2d 218. If a court finds a claim frivolous, then it must grant reasonable attorney's fees under § 814.025(1). *Sommer v. Carr*, 99 Wis. 2d 789, 799, 299 N.W.2d 856 (1981). The court determines the reasonableness of the fees. *Stivarius*, 121 Wis. 2d at 158.

¶31 Because the trial court generally "has the expertise to evaluate the reasonableness of the fees with regard to the services rendered," it need not hold an evidentiary hearing. *Tesch v. Tesch*, 63 Wis. 2d 320, 335, 217 N.W.2d 647

(1974). The determination of the reasonableness of attorney's fees is not the type of issue or question of fact where an adversarial presentation is necessary. An itemized bill submitted by affidavit may be sufficient evidence to establish attorney's fees. *Lucareli v. Vilas County*, 2000 WI App 157, ¶¶12-13, 238 Wis. 2d 84, 616 N.W.2d 153.

¶32 Here, the trial court allowed Garber attorney's fees of \$25,592.25 and costs of \$1988.59 for his defense against Omegbu's counterclaim. An examination of Garber's trial counsel's submission reveals a lengthy, detailed explication of the legal services and costs necessary to fend off the allegations in Omegbu's counterclaim. Without a doubt, the trial court examined the relevant facts, applied the proper standards of law, and utilized a demonstrated rational process to reach a conclusion that a reasonable court could reach. *Loy v. Bunderson*, 107 Wis. 2d 400, 414-15, 320 N.W.2d 175 (1982). There was no error committed in either the trial court's determinations or conclusions in arriving at reasonable costs and attorney's fees.

C. Other Motions.

¶33 Omegbu first claims the trial court erroneously exercised its discretion in failing to grant his motion for sanctions against Garber. He argues the basis for his motion is that Garber's own motion to dismiss the eviction action is proof that the eviction action was frivolous. In partial response, we recite the trial court's dispositional remarks:

The court has reviewed that motion and finds that defendant continues the abusive conduct for which this court is imposing sanctions. There is no basis for finding that plaintiff's claims are frivolous. Plaintiff brought this action for eviction damages of unpaid rent, late fees and statutory double damages. Defendant admitted that he did not pay rent for November and December 2002 or for

January 2003. Defendant vacated the premises on or about December 12, 2002. These claims were not frivolous. Plaintiff dismissed them in an effort to terminate this litigation not because they were without merit.

¶34 In *Stoll v. Adriansen*, 122 Wis. 2d 503, 518, 362 N.W.2d 182 (Ct. App. 1984) we declared “[a] claim is not frivolous simply because a party fails to pursue it.” The facts forming the basis for Garber’s eviction damage claim are not in dispute. Omegbu has presented no evidence that he was forced to defend himself against a frivolous claim.

¶35 Omegbu’s motion for sanctions under WIS. STAT. §§ 814.025 and 802.05(1)(a) were properly dismissed. Because the trial court did not erroneously exercise its discretion in denying Omegbu’s motion for sanctions, its decision to award Garber reasonable attorney’s fees of \$1012 and costs of \$15 for his defense efforts against Omegbu’s motion for sanctions and the motion to bifurcate and stay were properly executed.

¶36 Second, Omegbu claims trial court error in failing to recognize the automatic stay provisions of the Federal Bankruptcy Act. During the course of these protracted proceedings, Omegbu filed for a Chapter 7 Bankruptcy. Pursuant to a motion by Garber, the trial court imposed costs and attorney’s fees against Omegbu for failing to comply with a discovery request. The motion was heard after Omegbu filed for bankruptcy. Thus, he argues that the automatic stay provisions of 11 U.S.C. § 362(a)(1) (1993 & Supp. 1997) operate to prevent the imposition of sanctions that were ordered by the trial court. This contention is unavailing.

¶37 11 U.S.C. § 362(a)(1) clearly states that the automatic stay provision applies only to “proceeding[s] against a debtor.” Here, the debtor, Omegbu,

commenced a counterclaim for damages against his former landlord due to an alleged injury to his leg and conversion of his personal property. The trial court's sanction order for discovery abuse was proper in that it related only to Omegbu's failure to answer discovery questions pertaining to his counterclaim against Garber for damages he sought. The case law cited by Omegbu in support of his argument is not applicable. His claim fails.

¶38 Third, Omegbu claims it was an erroneous use of discretion for the trial court to sanction him after he had filed additional supplementary answers to Garber's discovery demands. At the hearing, however, as revealed by the record, the trial court questioned Omegbu about his supplementary answers and concluded they were inadequate and incomplete. The record reveals that the trial court, in examining and rejecting his assertions, properly applied the standards set forth in *Loy*. The trial court did not erroneously exercise its discretion in imposing the sanctions in the amount of \$575.

¶39 Fourth, Omegbu claims the trial court erroneously exercised its discretion in failing to strike Garber's pleading as a "bad faith" sanction for filing a confidential report with a mediator in the action. On May 10, 2004, the trial court heard the motion. In addressing the issue, the trial court clearly stated the applicable law relative to WIS. STAT. § 802.12, the alternative dispute resolution procedure:

If the mediator wishes to have information from the parties, he was entitled to do so; and there is no basis to impose any sanctions.

....

Based on your filing, the information you told me in your complaint was that the mediator was getting information from the other party that you could not see. That is part of mediation.

There is no basis for what you are complaining about.

¶40 Because, as revealed by the record, the trial court was correct in the methodology it employed to examine Omegbu's claim, no error occurred. This claim fails.

¶41 Finally, Omegbu claims the trial court erroneously exercised its discretion when it denied his request to amend his counterclaim to allege a claim against Garber's insurer, Midwest Mutual Family Insurance Company. He filed his motion after the trial court granted summary judgment dismissing his counterclaim.

¶42 He argues, however, that because the scheduling order "did not mandate any time to amend the counterclaim, his motion was proper." As additional support, he asserts he had filed certain motions with his pretrial report which included a non-specific motion to amend his pleadings to conform to the evidence. We reject this claim of error for the following reason. All of the sundry motions which he filed with his pretrial report presumed that a trial would take place. When the trial court, on May 10, 2004, granted summary judgment in favor of Garber dismissing the counterclaim in its entirety, the previously filed motion became moot and thus, of no procedural consequence. *State v. Cooper*, 2003 WI App 227, ¶16, 267 Wis. 2d 886, 672 N.W.2d 118.³ Any motions relating to

³ Omegbu asks this court to recognize the precedential value of five California decisions to support his claim for indemnification coverage. We reject this request. In addition, at the May 10, 2004 summary judgment hearing, the trial court addressed the potential liability insurance claim raised by Omegbu, stating: "I think also as to the issue of possible insurance coverage, if the claim relates to the altercation with his wife, certainly that was intentional conduct and therefore there would certainly be no basis for a claim."

procedures filed after the granting of the summary judgment which we have affirmed in this opinion are beyond the pale of proper consideration.

By the Court.—Orders affirmed.

Not recommended for publication in the official reports.

